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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 68

THE UNITED STATES OF AMERICA, *Petitioner*
v.
FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

BRIEF OF HOUSTON DEEPWATER LAND COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1949

No. 816

THE UNITED STATES OF AMERICA, *Petitioner*

v.

FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

BRIEF OF HOUSTON DEEPWATER LAND COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

There is no showing of any special or important reason why in the exercise of sound judicial discretion this Court should grant the Petition for a Writ of Certiorari. There is no conflict with any decision of this Court and there is no conflict of decisions among the Courts of Appeal for the various circuits. The case presents no new principle of law. On the contrary, the opinion of the Court of Appeals in affirming the judgment of the District Court did not depart from, but in all respects recognized and applied the well settled rules of controlling Federal decisions in condemnation cases.

The judgment was for the value of the land only,

as it physically existed on the date of taking, including any integral part added to the soil by the filling and leveling, and the increment added by reason of the lands' same accessibility to adjacent navigable waters which had been deepened and improved by dredging outside the area of this Respondent's condemned lands. Nothing was awarded for the value of any Government owned property placed on Respondent's leased parcels of land.

As to this Respondent the question presented is not as broad as Petitioner states, but precisely the question is whether Houston Deepwater Land Company is entitled in this condemnation to compensation for the enhanced value of its lands resulting from the filling and leveling of such lands and the dredging of adjacent navigable waters by the United States prior to the institution of the condemnation and while such lands were under lease to the United States or its agent.

ARGUMENT

The Court below correctly states that the judgment entered in favor of this Respondent, Houston Deepwater Land Company, was based upon the value of its condemned parcels of land at the time of taking, excluding therefrom the value of all facilities and improvements constructed or erected upon such lands. Consequently, such decision does not conflict with the decisions of this Court announcing the rule that where a body clothed with the power of eminent domain, in good faith and under a claim of right, enters

upon lands necessary for its public purposes and erects structures upon such land for its own use, that such structures do not in law become a part of the land, and that such body may later condemn the land without being required to pay more than the value of the land without the structures erected upon it.

Petitioner cites and relies upon four decisions of this Court. Such decisions were grounded upon different facts, because in the present case Respondent claimed nothing and was allowed nothing for the value of any structure, machinery, equipment, or improvement which under the leases remained the property of the condemnor even though affixed to the land.

The first case cited by Petitioner is *Searl v. School District, Lake County*, 133 U. S. 553. There the school district had purchased the squatters' rights of the parties in possession of the lots involved, paying the full value of such lots, in reliance upon the advice of counsel that the title it purchased was superior to that of other parties claiming under a patent. After the school house had been built upon said lots and when the title was found defective, the school district instituted condemnation proceedings against the true owner. The value of the lots, both with and without the school house, was stipulated. The owner claimed the right to be compensated for the value of the land with the school house, under the common law principle that whatever is permanently annexed to the soil becomes a part of it, and that the school house on completion became his property. This Court ap-

plied the well recognized exception to the strict common law rule of fixtures and held that the school house was the property of the condemnor and not of the land owner, and that its value could not justly be included in the land owner's compensation.

In *Consolidated Turnpike Company v. Norfolk & O. V. R. R. Co.*, 228 U. S. 596, it was shown that Bayshore Terminal Company had purchased from the Turnpike Company a right of way strip upon which it constructed a line of electric railway and the necessary power houses and stations. The conveyance to the Bayshore Company was subject to two prior mortgages on all property of the Turnpike Company. After the electric line and power houses and station had been erected upon the right of way strip, the Receiver of the Bayshore Terminal Company instituted proceedings to condemn the mortgagee's interest in such strip. The mortgagee contended for the value of such permanent fixtures of the condemnor attached to the land in assessing the value of the land taken. Again this Court applied the same exception to the common law rule of fixtures, and held that the Virginia Court had properly ruled that the public service corporation had the right to enter under the deed of the mortgagor company and later condemn, compensating the mortgagees for the land only.

The third case relied upon by Petitioner is *U. S. v. Miller*, 317 U. S. 369. Such decision is not apposite to the question upon which Petitioner grounds its right to a Writ of Certiorari. This Court there held that the owner of property taken by eminent domain

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for a public use is not entitled to the benefit of any increment of value added to the property taken by reason of a previous condemnation of adjacent lands for a public project, where such public project from the beginning had included the lands later sought to be condemned.

The Miller case makes no pronouncement in conflict with the decision of the Court below. Only in the event this Court should direct that the entire case be brought before it for review would the Miller case be relevant, and then it would control solely because of this Respondent's alternative contention urged in the Courts below that certain of its parcels of land taken by this condemnation were clearly not within the scope of the original shipbuilding project, and so in any event would be entitled to the increment in value found to have been added to them.

The fourth case relied upon by Petitioner is *U. S. v. Cors*, 337 U. S. 325. There is no conflict with the holding in that case, which was a suit under Section 902 of the Merchant Marine Act. The majority opinion followed previous decisions of this Court in applying the rule that any enhancement of value owing to the condemnor's urgent and special need for the property condemned is not to be allowed as a constituent of fair market value at the time of taking, as such enhancement is a holdup value and not a fair market value. The facts of the instant case do not bring it within the rule of the Cors case.

To determine whether there is a conflict with the

rule of any of such cited cases, it is necessary to see what are the facts of the present case.

Petitioner correctly states that by the First Facilities Contract, the Houston Shipbuilding Corporation undertook to lease some of the parcels of land involved in this proceeding and to construct thereon a shipyard. The United States agreed to bear the entire cost of the shipbuilding project. Such contract, as well as the additional facilities contract, specified that the United States retained title to all structures and other property belonging to it and placed on the leased parcels, even though attached to the realty (Petition pp. 2, 3). The leases provided that at their expiration the United States had the right to remove the structures and other property that the United States concededly owned (R. 201).

The contracts clearly distinguished between "facilities" and "real estate." By "facilities" was meant not "land" (R. 237, 249), but property owned by the Government contemplated to be constructed, erected, or installed upon the leased premises (R. 238, 242); property that could be removed (R. 197, 253, 312) and disposed of (R. 253); property that could be depreciated (R. 243); insured (R. 249); and inventoried (R. 253).

The parcels of land owned by Respondent were not "facilities" to which the Government as Lessee had or retained title. They were not property recognized by the leases as that which the Government had the right to remove, as in the case of structures and

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equipment erected upon the land itself. The "land," as distinguished from "facilities," was owned by the Respondent and not by Petitioner, so in paying for the land only, the Petitioner is not paying for its own property.

This fact alone distinguishes the instant case from the fact situations of the Searl-School District case, supra, and similar cases cited by Petitioner as being in conflict.

Another distinguishing fact is that the Government neither had nor retained title to the navigable waters covering the bed of Buffalo Bayou and the Houston Ship Channel. Such waters were not property of Petitioner to which it retained title, were not property erected or installed upon Respondent's leased lands, and were not property which the Government had reserved the right to remove on termination of the leases. Neither this Respondent, as Lessor, nor the Houston Shipbuilding Corporation, as Lessee, could legally have contracted with respect to the removal of public waters.

Petitioner admits that if the Government had not condemned the parcels of land to which this Respondent had fee simple title that in all probability the lands would have been returned to Respondent at the expiration of the leases in their improved condition (Petition p. 6). Unquestionably, upon termination of the leases all of the rights of Petitioner in and to the leased lands would also have terminated, except the right to remove its own property erected

upon such lands. Upon termination of the leases, this Respondent was entitled to get back its lands with Government owned structures removed, but any integral part of the soil added or changed in the filling and leveling of the land itself was not a Government owned facility within the language of the relevant contracts and the intent of the parties.

Petitioner is obligated to pay just compensation only for what it took. Compensation was awarded only for the lands taken. What was taken from Respondent were leveled and filled lands accessible to deep water. Because of the characteristics inherent in such lands, they were at all times adaptable and suitable for all industrial purposes requiring access to deep water. Such frontage upon and accessibility of the lands to the waters of Buffalo Bayou and the Houston Ship Channel was the principal element of value, not only in February 1941 (the date of first lease), but also in November 1942 (the date of order of possession), when the previously existing ship channel had been deepened and extended by dredging operations to the harbor lines of some of the condemned parcels. Undeniably, it was the long continued public improvement of the Houston Ship Channel by dredging prior to February 1941, that gave the City of Houston its rank within the top four ports of the United States, and gave to Respondent's lands and similar lands with such deep water influence, the substantial values of February 1941 and prior dates.

Petitioner asserts that because such leveling and filling of Respondent's lands and the dredging of

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adjacent public navigable waters added to the value, that Respondent is not entitled to such added value because the leases recognize the Government's title to all of its property placed upon the leased lands and the Government's right to remove such property. Petitioner argues that because the Government, without violating any provision of the leases, could have unfilled or unleveled Respondent's lands, and could have destroyed by filling the improved navigability of adjacent public waters, that Respondent should be denied these elements of value existing as a part of the property taken and inherent in the land itself on the date of taking. The Court below thought such contention fantastic.

Not only is the contention fantastic, but it is also without factual basis. By filling and leveling Respondent's lands the Government changed the surface detail and the ground features of the land, but it did not change the ownership of the land. No provision of the leases gave Petitioner the right on their termination to remove the land itself, which was the sole property of Respondent. By filling in the low areas of the parcels or by cutting down and leveling off the high areas, or by depositing and spreading soil or dirt in the general leveling process, the Government did not change the character of the land from realty to personalty. The deposits of earth made and spread upon the land adhered to and became incorporated in and formed a part of the surface of the ground. Such deposits were not made with a view to removal. In fact it is not within the realm of reasonable conjecture

that Petitioner could have removed or restored exactly this same soil or dirt. Such deposits were an integral and indistinguishable part of the soil itself, the soil of the land owned by Respondent, the land to which Government owned facilities were annexed, and the actual land taken by this condemnation.

So it can be said that this case was decided under well settled principles of law. The rules applied by the Court below are in accord with the repeated pronouncements of this Court that just compensation within the meaning of the Fifth Amendment for property taken for public use requires the owner to be put in as good a position pecuniarily as he would have occupied if his property had not been taken, and that the value of private property so taken shall be determined as of the date of taking and with reference to the loss the owner sustains, considering the property in its condition and situation as of the date of taking.

To put Respondent in as good condition pecuniarily as it would have been upon reversion at the termination of the leases requires Petitioner to pay for the elements of value actually existing as a part of the property taken. The right to receive the lands back with the changed topography of the soil inhered in the land owner. This right, together with the fee simple title to the lands, the Government took. It is

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just that it should pay therefor. The compensation awarded is for such value only.

Respectfully submitted,

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